NIINO & CO. LTD.

v.

KOW LUP KAI

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CIVIL SUIT NO. K. 180 OF 1991]
14 SEPTEMBER 1991

CIVIL PROCEDURE: *The plaintiff filed a summons-in-chambers under O. 29 r. 1 and applied for an order that the defendant shall in writing disclose to the plaintiff the whereabouts of three tractors (or their replacements) and that the defendant shall deliver the said items to the plaintiff within 48 hours.*

Pursuant to a loan agreement signed by the parties, the defendant as managing director of Soon Yee Sdn. Bhd. obtained financial assistance of US$300,000 from the plaintiff on 19 February 1990. A bill of sale between defendant (called the owner) and plaintiff was signed on the same date when defendant assigned the chattels by way of security.

The issue before the Court was that it was submitted that there is no such proviso in the Malaysian Rules of the High Court. The English Rule, O. 29 r. 2A, though on similar strain, is derived from an Act of Parliament, that is, Torts (Interference with Goods) Act of 1977.

Held:

[1] The scope of O. 29 gives effect to the powers of the Court to provide for the interim preservation of property. The jurisdiction to grant an injunction is always a matter of discretion which is to be exercised in accordance with well-known principles. It has been said that the power of granting mandatory injunctions must be exercised with the greatest possible care.

[2] As a general rule the proper remedy of a person seeking to enforce the observance of a positive contract or covenant is by way of an action for specific performance.

[3] I have examined the plaintiff's writ of summons where the plaintiff claimed against the defendant

(1) an injunction to compel the defendant to disclose to the plaintiff the whereabouts of the three tractors;

(2) costs; and

(3) such further or other relief

So really the cause or matter is the same as the order applied for under the summons-in-chambers under O. 29 r. 1.

[4] A plaintiff wishing to prevent the disposition of goods must show a specific right in the property. I am not satisfied that I can grant an injunction on such facts. It would appear that plaintiff has thought out this ingenious method to enforce his rights under an agreement but not in accordance with the rules or procedure allowed under the law.

[5] The governing consideration is the maintenance of the status quo pending the trial. What *status quo* do we maintain if I were to grant this injunction. There is none except to enforce the rights which plaintiff claims under the so-called loan agreement and/or the bill of sale.

[6] An injunction will not be granted to restrain a defendant who is alleged to be a debtor from parting with his property. Always bear in mind that one who goes into any agreement must realise the pitfalls and dangers and know the risks and the legal methods for remedy.

[Application dismissed. No order as to costs.]

Cases referred to:
Isen Berg v. East India Co. Ltd. [1863] 3 De GJ & SM 263 ***(foll)***
Gibb & Co. v. Malaysia Building Society Bhd. [1982] 1 MLJ 271 ***(cons)***
Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok [1975] 2 MLJ 109 ***(cons)***
Texaco Ltd. v. Mulberry Filling Station Ltd. [1972] 1 All ER 513 ***(foll)***
Robinson v. Pickering [1881] 16 Ch D ***(foll)***
The Siskina [1977] 3 All ER 803; [1977] 3 WLR 818 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 81

Other source referred to:
Stroud's Judicial Dictionary, 4th Edn., Vol., 3 p. 1369

For the plaintiff - Marina Tiu; M/s. Yap Chin & Tiu
For the defendant - Norbert Yapp; M/s. Jayasuriya Kah & Co.

JUDGMENT

Syed Ahmad Idid JC:

The plaintiff filed summons-in-chambers under O. 29 r. 1 and applied for an order that the defendant shall in writing disclose to the plaintiff the whereabouts of three tractors (or their replacements) and that the defendant shall deliver the said items to the plaintiff within 48 hours. Order 29 r. 1 states:

> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

Mr. Yapp of Counsel for the defendant raised a preliminary objection on the grounds that:

(i) the summons-in-chambers was misconceived in law and alien to O. 29 r. 1;

(ii) the plaintiff wants discovery, not an injunction;

(iii) the plaintiff wants specific performance.

It was additionally submitted that there is no such provision in the Malaysian Rules of the High Court. The English rule, O. 29 r. 2A, though on similar strain, is derived from an Act of Parliament that is, Torts (Interference with Goods) Act of 1977.

The facts of the matter are that the plaintiff and defendant (as managing director of Soon Yee Sdn. Bhd.) signed a loan agreement wherein Soon Yee obtained financial assistance of US$300,000 from the plaintiff on 19 February 1990. A bill of sale between defendant (called the owner) and plaintiff was signed on the same date when defendant assigned the chattels by way of security. At this stage, there is no need to comment on the form and/or substance of the bill of sale.

The scope of O. 29 gives effect to the powers of the Court to provide for the interim preservation of property. The jurisdiction to grant an injunction is always a matter of discretion which is to be exercised in accordance with well-known principles. It has been said that the power of granting mandatory injunctions must be exercised with the greatest possible care. *Isen Berg v. East India Co. Ltd.* [1863] 3 De GJ & SM 263.

What is an injunction? *Stroud's Judicial Dictionary* (Fourth Edn.) Vol. 3 p. 1369 defines an injunction is a **Judgment**, or **Order**, to do or refrain from doing a particular thing. It is either:

(1) interlocutory or interim, that is, an order until the hearing of the action or further order: or

(2) perpetual, that is, a judgment determining and concluding the right in litigation; it is also

(a) restraining, that is, when it inhibits the doing of anything; or

(b) mandatory, that is, when it commands the doing, or restoring, of anything.

Miss Marina Tiu, of Counsel for the plaintiff, cited cases of *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] 1 MLJ 271 (Federal Court) and *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109 where Abdoolcader J delivered both judgments. Miss Tiu added that plaintiff was asking for an order to compel defendant to disclose and deliver the vehicles which "plaintiffs are entitled to seize under the bill of sale." The Bill of Sale Ordinance (Cap. 14) in fact at s. 4 sets out the procedure for the taking of possession of items which are the subject matter of the bill. She added that "the order is to prevent dissipation of the tractors, the subject matter of the bill of sale." To this Mr. Yapp's response was that in order to obtain specific performance, the Rules of High Court provides a different procedure, that is, under O. 81. I may add that as a general rule the proper remedy of a person seeking to enforce the observance of a positive contract or covenant is by way of an action for specific performance.

An injunction may be granted to any party **To a cause or matter** before or after the trial of the **Cause or matter** ... (O. 29 r. 1). I have examined the plaintiff's writ of summons dated 22 August 1991 where the plaintiff claimed against the defendant

(1) an **Injunction** to compel the defendant to disclose to the plaintiff the whereabouts of the three tractors;

(2) costs; and

(3) such further or other relief. So really the **Cause or matter** is the same as the order applied for under the summons-in-chambers dated 5 September 1991 under O. 29 r. 1. A plaintiff wishing to prevent the disposition of goods must show a specific right in the property.

I am not satisfied that I can grant an injunction on such facts. It would appear that plaintiff has thought out this ingenious method to enforce his rights under an agreement but not in accordance with the rules or procedure allowed under the law. No doubt there is strength in the reminder that

> ... the governing consideration is the maintenance of the *status quo* pending the trial ...

See *Texaco Ltd. v. Mulberry Filling Station Ltd*. [1972] 1 All ER 513. What *status quo* do we maintain if I were to grant this injunction? There is none except to enforce the rights which plaintiff claims under the so-called loan agreement and/or the bill of sale.

The Court sympathises with the plaintiff as it would appear that the defendant is not co-operating but placing obstacles. An injunction will not be granted to restrain a defendant who is alleged to be a debtor from parting with his property. *Robinson v. Pickering* [1881] 16 Ch.D. See *The Siskina [*1977] 3 All ER 803; [1977] 3 WLR 818 HL. Always bear in mind that one who goes into any agreement must realise the pit falls and dangers and know the risks and the legal methods for remedy. Outside that I cannot assist the plaintiff and accordingly I dismiss the summons-in-chambers dated 5 September 1991. I shall make no order as to costs.

Also found at [1992] 1 CLJ 460